



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 5 OF 2016

SAFARICOM LTD.....PLAINTIFF

VERSUS

EMFIL LIMITED.....DEFENDANT

RULING

(Application for review; court having dismissed the plaintiff's suit for want of prosecution but not making an order for costs of the suit in favour of the defendant; defendant making an application to review that order so that the suit is marked as dismissed with costs; defendant arguing that there is an error apparent on the face of the record; costs being in the discretion of the court; no error apparent on the face of the record where the court in its own wisdom fails to award a successful party costs of the suit; avenue is to file an appeal and not an application for review; application dismissed)

1. The defendant filed an application dated 20 May 2019 seeking orders for leave to amend the counterclaim and for review of the order of 16 May 2019. I directed the order for amendment to be heard separately from the prayer for review and I did allow the applicant leave to amend the counterclaim through my ruling of 24 September 2019. What remains is the prayer for review which is the subject of this ruling.

2. To put matters into context, this suit was filed on 15 January 2016 by the respondent, a telecommunication company. The respondent had installed telecommunication masts in the land parcel Kwale/Ramisi/Kinondo SS/150 after entering into an agreement with Jua Maisha Limited who held themselves as owners of the land. The respondent sued the applicant for interfering with the land and sought orders to have the applicant permanently restrained. The applicant filed a defence and counterclaim where it asserted that it is the rightful owner of the suit land. In the counterclaim, they inter alia sought orders to have the respondent remove its telecommunication masts and damages for trespass.

3. Through an application dated 13 April 2018, the applicant applied to have the respondent's suit dismissed for want of prosecution. The application was heard by my predecessor in the station, Omollo J, and allowed on 16 May 2019. The respondent's suit was dismissed for want of prosecution and the court further made orders that the respondent removes its masts within 45 days.

4. In this application, the applicant wishes to have the order of 16 May 2019 reviewed and varied in the terms that costs of the suit be awarded to the applicant. It is the position of the applicant that having dismissed the suit, the Court erred on the face of the record in failing to award costs of the suit to the applicant, which is against the general rule that costs should follow the event.

5. The respondent filed Grounds of Opposition where it contended inter alia that the application seeks to have this court sit as an appellate court. It is further argued that costs are discretionary and cannot be subject of review but an appeal.

6. I invited counsel to file written submissions and I have seen and read the submissions of counsel for the applicant and for the respondent. I have considered these submissions before arriving at my decision.

7. The application has been brought pursuant to the provisions inter alia of Order 45 which provides for review. Order 45 Rule 1 provides as follows :-

Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or

evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

It will be seen from a reading of Order 45 Rule 1 (b) that one may apply for review where :-

- a. there is discovery of new and important matter or evidence which could not be produced by the applicant at the time that the decree or order was made;
- b. where there is some mistake or error apparent on the face of the record; or
- c. where there is other sufficient reason.

8. I do not think that there is any discovery of new evidence within this application and indeed no new facts have been presented before me. The applicant however believes that there is an error on the face of the record, the error being that there was a failure to make an award of costs, yet there was a prayer for costs in the defence and counterclaim. I therefore assume that this application has been made solely on the allegation that there is an error on the face of the record.

9. Now, an award of costs is in the discretion of the judge and this is brought out in Section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya.

27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

10. It will be seen from Section 27 (1) that “*the costs of and incidental to all suits shall be in the discretion of the court or judge...*”. It cannot therefore be termed as an error apparent on the face of the record when the court fails to award a party the costs of the suit. A party may indeed be successful in a matter but for one reason or another the court may be persuaded that such party does not deserve costs.

11. It is not for me to second guess why the good judge failed to award costs and in any event I cannot sit on appeal against that decision. If the applicant is not happy that the good judge failed to make an award of costs in its favour, then the avenue is to file an appeal and not to seek a review. If I reverse the order on costs then I will certainly be sitting on appeal and I do not have that jurisdiction.

12. For the above reasons, the application dated 20 May 2019 is hereby dismissed in so far as it seeks orders for review. Costs of the application will be to the plaintiff/respondent.

13. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF: